IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN

1. S.B. Criminal Appeal No.928/2001

Ajay Harijan S/o Shri Pancham, Resident of
Harijan Kacchi Basti, Sanganeri Gate,
Jaipur
...Accused-appellant
Versus
The State of Rajasthan through its
Public Prosecutor
...Respondent

2. S.B. Criminal Appeal No.929/2001

Vineet Kumar S/o Murari Lal, Resident of
H-45, Sanganeri Gate, Behind Minarwa Talkies,
Police Station Lal Kothi, Jaipur
...Accused-appellant
Versus
The State of Rajasthan through its
Public Prosecutor
...Respondent

Date of Judgment :::: 19th February, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Presence in Criminal Appeal No.928/2001

Shri V.R. Bajwa, Counsel for accused-appellant Ajay Harijan
Shri Arun Sharma, P.P., for the State

Presence in Criminal Appeal No.929/2001

Shri Vijay Singh Poonia, Counsel for accused-appellant Vineet Kumar
Shri Arun Sharma, P.P., for the State

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//Reportable//

By the Court:-

These two appeals arise out of the common judgment and order, therefore, the same are being disposed of finally by this common judgment.

The challenge in both these appeals is made to the judgment and order dated 5th of November, 2001, passed by the Additional District and Sessions Judge No.1, (Fast Track), Jaipur City, Jaipur, in Sessions Case No.115/2001, whereby accused-appellants have been convicted and sentenced as under:-

Accused	***Conviction under Section***	***Sentenced to***
Ajay Harijan	376, IPC	To ten years rigorous imprisonment and a fine of Rs.1000/-; in default of payment of fine, to further undergo one year's rigorous imprisonment
	120-B, IPC	To one year's rigorous imprisonment and a fine of Rs.500/-; in default of payment of fine, to further undergo three months' rigorous imprisonment

Accused	*Conviction under Section*	*Sentenced to*
Vineet S/o Murari Lal	376 read with Section 120-B, IPC	To seven years rigorous imprisonment and a fine of Rs.1000/-; in default of payment of fine, to further undergo one year's imprisonment.

Both the sentences were ordered to run concurrently.

Exhibit P-5, a written-report, was lodged by prosecutrix Archna (PW-3) at Police Station Malviya Nagar, Jaipur, wherein she alleged that on 25th of December, 1996, when she, upon being annoyed with the family, ran away from her house, at about 1.30 one boy Ajay took her in Usha Colony and committed forcible sexual intercourse with her. Upon her raising hue and cry, the persons residing there came and helped her. One constable, who was on patrolling, was called and accused was handed-over to him, who took the accused at the police station. I also followed them to the Police Station. Therefore, a report be registered and action be taken according to law. She is residing in Class X and her age is 17 years. On the basis of this report, an FIR No.530/96 was registered under Section 376/342, IPC, and investigation commenced.

Exhibit P-6, the site-plan, was prepared. Exhibit P-2 is the medical-report of prosecutrix Archna, wherein the doctor opined that opinion regarding recent sexual intercourse will be given after receiving chemical analysis report. Exhibit P-1 is the X-ray/medical-report in respect of age of the prosecutrix, wherein it was opined that she is between 18 to 20 years on the date of her examination. Exhibit P-3 is the medical-report of accused Ajay, wherein it was opined that nothing is suggestive that he is impotent. Exhibit P-4 is the report on ossification-test wherein the age of accused Ajay was mentioned as above 20 years at the time of examination.

During investigation of the case, accused Vineet was also impleaded as accused levelling against him the charge of conspiracy under Section 120-B, IPC. After completion of investigation, the Investigating Agency filed a challan against both the accused-persons under Sections 376 and 120-B, IPC.

The learned trial court framed charge against accused Ajay for the offence under Sections 376 and 120-B IPC, and against accused Vineet under Section 376 read with Section 120-B, IPC. Both the accused-persons denied the charge and claimed to be tried.

Shri V.R. Bajwa, the learned counsel for accused Ajay, contended that although PW-3 Archna, the prosecutrix, has stated that Ajay committed rape with her and there is corroboration of medical evidence in this regard, but he pointed out certain infirmities in the prosecution case which, according to him, are fatal thereto and the accused becomes entitled to get the benefit of doubt. He contended that the Investigating Officer in the present case was not examined, therefore, the accused could not get proper opportunity to cross-examine him in respect of investigation done in the case. There were three independent witnesses in the case, namely PW-9 Rewad, PW-10 Prahlad and PW-11 Vinod Kumar, but they all were declared hostile by the prosecution during trial of the case. He contended that there is no evidence in the present case to connect the accused with the crime, except the statement of prosecutrix PW-3 Archna and Constable PW-5 Surendra Singh, who was on petrolling in the area and was called by local residents at the place of occurrence. He contended that so far as the statement of Constable PW-5 Surendra Singh is concerned, the same cannot be read in evidence as the same is not admissible as per Section 25 of the Evidence Act, therefore, he contended that the order

passed by the trial court convicting and sentencing the accused-appellant be set aside and he be acquitted of the charge.

Shri V.R. Bajwa, the learned counsel for accused Ajay, lastly contended that accused Ajay has already remained in jail for about five years and eight months and if the period of remission is added to it, then it comes to about seven years, therefore, looking to all the facts and circumstances of the case, particularly the facts that the incident relates to the year 1996, and the independent witnesses have been declared hostile by the prosecution, the sentence of imprisonment awarded by the trial court be reduced to a period of sentence of imprisonment already undergone by him. In support of his contentions, he referred the following judgments:-

1. State of Chhatisgarh Vs. Lekhram – (2006) 5 SCC 736

2. Ram Kumar Vs. State of Haryana – (2006) 4 SCC 347

3. State of Chhattisgarh Vs. Derha – (2004) 9 SCC 699.

Shri V.S. Poonia, the learned counsel for accused Vineet, contended that it is a case where accused Vineet has falsely been implicated, which is

apparent from the fact that the written-report Exhibit P-5 was lodged by the prosecutrix herself and therein she did not state the name of accused Vineet. It is further contended that according to the statement of Constable PW-5 Surendra Singh as well as statement of the prosecutrix, recorded during trial, accused Vineet was also present at the place of occurrence; he was also brought at the police station by Constable PW-5 Surendra Singh, but still his name does not find place in the FIR as PW-3 Archana, the prosecutrix, did not quote his name in the written-report lodged by her, nor stated by the In-charge of Police Station, Malviya Nagar, in the police proceedings - below the FIR. He further contended that according to the statements of prosecutrix PW-3 Archna and Constable PW-5 Surendra Singh, accused Vineet was very much available at the police station but he was not arrested. The FIR was also not registered under Section 120-B, IPC. He also referred Exhibit P-6, the site-plan, wherein reference of offence in the case was given under Sections 376 and 342, IPC, and, therefore, there is no reference of offence under Section 120-B, IPC, even up-to preparing the site-plan of the place of the incident. He also referred the details of site-plan (Exhibit P-6). Place marked with ‘X’ in the

site-plan shows that there is a reference of foot-steps of accused Ajay and prosecutrix Archna at the spot but there is no reference of foot-steps of accused Vineet in it. Place marked with 'G' in the site plan (Exhibit P-6) further shows that accused Vineet was waiting at this place, where from the local residents handed over both the accused Ajay and Vineet to police. He contended that Vineet was waiting at place 'G', which is 100 feet far from the place of incident where accused Ajay is said to have committed forcible sexual intercourse with Archna and there is no prosecution evidence to show that there was any conspiracy in the mind of accused Vineet and that he was having knowledge about the offence being committed by Ajay so as to connect him with the crime with the help of Section 120-B, IPC. He also contended that there were only three eye witnesses of the incident, namely, PW-9 Rewad, PW-10 Prahlad and PW-11 Vinod Kumar and all the three witnesses have been declared hostile by the prosecution. He contended that there is no other prosecution evidence against accused Vineet, except the statement of prosecutrix PW-3 Archna and Constable PW-5 Surendra Singh. He referred the statement of PW-5, who stated that he reached subsequently at the spot and when he reached he saw

there about 7-8 persons were already standing there, who handed over accused Ajay and Vineet along with prosecutrix Archna to him and he brought all the three persons at police station and handed-over to the In-charge of Police Station. He contended that Constable PW-5 Surendra singh cannot be said to be an eye witness in the case and the trial court has wrongly convicted accused Vineet on the basis of statement of Constable PW-5 Surendra Singh, on the allegation that he shut the mouth of the prosecutrix when accused Ajay was committing rape with her. It is further contended that Constable PW-5 stated that another constable Ram Niwas was on patrolling with him and accompanied him for the place of occurrence but name of Ram Niwas was not included in the list of witnesses nor he was examined during trial by the prosecution, therefore, he contended that so far as accused Vineet is concerned, there is no iota of evidence against him so as to connect him with the crime and the prosecution has failed to prove the case against him beyond all reasonable doubts and he is entitled to get the benefit of doubt and he be acquitted accordingly.

The learned Public Prosecutor, on the other hand, contended that there is prosecution evidence against both the accused persons and the learned

trial court has considered the prosecution evidence in detail and has recorded the correct finding against them. It is further contended that non-examination of the Investigating Officer is not fatal to the prosecution case. The citations referred by Shri V.R. Bajwa, the learned counsel for accused-appellant Ajay, are not applicable in the facts and circumstances of the present case. He, therefore, contended that there is no merit in any of the appeals of the accused and both the appeals are liable to be dismissed.

I have considered the submissions of learned counsel for both the parties and minutely scanned the impugned judgment as well as the record of the trial court.

Exhibit P-5 is the written-report in the handwriting of PW-3 Archna, wherein she alleged that she ran away from her house due to some annoyance. She further stated that accused Ajay met her in the way and took her to Usha Colony, where he committed rape with her. The statement of prosecutrix was recorded under Section 161, Cr.P.C. (Exhibit D-1), wherein she took the name of Ajay. As per the medical-report (Exhibit P-2) the opinion about rape was kept reserved. Subsequently, the FSL report (Exhibit P-22) was received, which was placed on the

record, and according to the FSL report the human semen was detected in Exhibits No.1, 2 and 4, from packets marked 'D', 'E' and 'A'. The statement of Dr. Bhanwar Singh (PW-6) was initially recorded on 29.5.1997, wherein he stated that tear was present at 6'O clock position but reserved his opinion about rape. Exhibit P-2 was proved by him. After receipt of FSL report (Exhibit P-22) his statement was again recorded on 6.10.2001 and on the basis of the report (Exhibit P-22), he stated that rape was committed with the prosecutrix. PW-3 Archna, in her statement, has specifically taken the name of accused Ajay that he committed forcible sexual intercourse with her. She has narrated the entire story of the incident in her statement before the trial Court. Therefore, I find that so far as accused Ajay is concerned the statement of prosecutrix PW-3 Archna is trustworthy and her statement is corroborated with the medical-evidence also, in addition to the statement of Constable PW-5, Surendra Singh, and no interference is called for by this Court in the order of conviction passed by the trial court against accused Ajay.

So far as accused Vineet is concerned, I find that as per the statement of PW-3 Archna as well as PW-5 Surendra Singh, both the accused-persons were

caught-hold of by the local inhabitants and they were handed over to Constable PW-5 Surendra Singh, who took them with Archna at Police Station and handed over them to In-charge, Police Station. It shows that two accused-persons as well as prosecutrix and Surendra Singh all four were present at the Police Station but in the written-report (Exhibit P-5), which is in the handwriting of PW-3 Archna herself, she did not mention the name of Vineet therein. In the police proceedings, below the written-report also there was no reference that Vineet was present or that he was handed over by Constable PW-5 Surendra Singh. There is no reference of the fact in the police proceeding that PW-5 Surendra Singh handed over the accused as well as the prosecutrix to the In-charge, Police Station Malviya Nagar. The case was also not registered under Section 120-B, IPC. The accused Vineet was present at the Police Station, as per the statement of PW-3 Archna and PW-5 Surendra Singh, but he was not arrested on 25th of December, 1996. Therefore, I find that the statement of PW-3 Archna is not corroborated with written-report Exhibit P-5, her own statement Exhibit D-1 recorded under Section 161 Cr.P.C., the site-plan Exhibit P-6, with regard to the facts relating to accused Vineet and it appears

to be a case of over-implication or false-implication of accused Vineet in the case. According to the statement of PW-3 Archna before trial court, there is no allegation of rape against Vineet and the trial court has convicted him with the aid of Section 120-B, IPC, on the basis of the statements of PW-3 Archna and PW-5 Surendra Singh, that accused Vineet shut her mouth when accused Ajay was committing forcible sexual intercourse with her. From the statement of PW-5 Surendra Singh it is clear that he reached at the spot subsequently after arrival of five to seven persons at the spot, therefore, PW-5 cannot be said to be an eye witness of the incident. Site-plan Exhibit P-6 further shows that the place marked with 'G' is the place where accused Vineet was waiting, which is more than 100 feet far from the place of incident, therefore, it is not believable that he shut the mouth of PW-3 Archna when accused Ajay was committing forcible sexual intercourse with her. There were three independent witnesses in the case – PW-9 Rewad, PW-10 Prahlad and PW-11 Vinod Kumar but they all were declared hostile during the trial and they did not support their earlier statements recorded under Section 161, Cr.P.C., vide Exhibit P-20, Exhibit P-21/A and Exhibit P-21. The Investigating Officer has

not been examined in the case. Another constable Ram Niwas, who also accompanied with PW-5 Surendra Singh, has not been examined by the prosecution. In these circumstances, I find that the prosecution has failed to prove the case against accused Vineet beyond all reasonable doubts and he is entitled to get the benefit of doubt.

So far as the sentence to accused Ajay Harijan is concerned, it is contended that he has already remained in jail for about five years and eight months and if a period of remission is counted then it comes to about seven years.

In Prem Chand Vs. State of Haryana, AIR 1989 SC 937, in the peculiar facts and circumstances of that case, the Hon'ble Supreme Court reduced the sentence of imprisonment of ten years awarded under Section 376 (2) IPC, to a period of sentence of imprisonment of five years. The State of Haryana filed review petition before Hon'ble the Supreme Court in the above case and the same was dismissed. The decision of the Hon'ble Supreme Court in that review petition is reported in (1990) 1 SCC 249 (State of Haryana v. Prem Chand & Others). Under sub-section (1) of Section 376 IPC the minimum sentence of seven years is prescribed but it is subject to proviso that the court may, for adequate

and special reasons, impose a sentence of imprisonment for a term of less than seven years.

In Ram Kumar's case (Supra) their Lordships of the Hon'ble Apex Court reduced the sentence of seven years under Section 376, IPC, to a period of three years imprisonment. Para No.3 of the judgment reads as under:-

> “3. The appellant, aggrieved by the order passed by the High Court has filed the above appeal by way of appeal. We have been taken through the statement and evidence recorded by the Court. Our attention was also drawn to the judgment passed by both the Sessions Court as well as the judgment passed by the High Court. The learned counsel for the appellant drew our attention to the statement of the girl Bimla (PW-5) and also drew our attention to the evidence of the doctor. We have carefully analysed the evidence tendered by the prosecution. In our opinion, sufficient evidence was tendered by the prosecution to prove the guilt of the accused. However, at the time of hearing it is brought to our notice that the girl has now got married and living with her husband. The said statement is also ratified by the evidence of the father of the girl. Having regard to the peculiar facts and circumstances of the case, we are of the view that the

> sentence imposed by the Sessions Court and as affirmed by the High Court under Sections 366 and 376 of the Penal Code is on the highside. In our opinion, ends of justice would be amply met if we reduce the sentence to three years. We do so accordingly."

In the case of State of Chhattisgarh Vs. Lekhram (Supra) the Hon'ble Apex Court reduced the minimum sentence under Section 376, IPC, of seven years to a sentence of one-and-half-year imprisonment, already undergone by accused therein. Para 16 of the judgment reads as under:-

> "16. The prosecutrix was a mature girl. She was married. She spent a few months in her in-laws' place. The respondent was working in her house. They, thus, knew each other for a long time. The prosecution evidently could not prove its case that she was enticed away from the custody of her guardian by the respondent on a false plea that he would marry her. She denied the said suggestion as presumably she was aware that she being married, the question of her marrying the respondent again may not arise. She lived for some time with the respondent in a rented house. Both the courts proceeded on the basis that she was a consenting party. The occurrence took place in

> the year 1986. The respondent preferred an appeal before the High Court in the year 1987. The same remained pending for about 10 years. The special leave petition was filed by the State 230 days after the prescribed period of limitation for preferring such appeal. The delay in filing the special leave petition, however, was condoned. He is said to have remained in custody for about one-and-a-half years. In the peculiar facts and circumstances of this case and having regard to the facts that both the courts have arrived at the conclusion that she was a consenting party, in our opinion, it may not be proper to send the appellant back to prison."

In the peculiar facts and circumstances of the present case, where there are material contradictions in the statement of the prosecutrix in respect of accused Vineet, I think it fit and proper to invoke the proviso of sub-section (1) of Section 376, IPC, and, in my opinion, ends of justice will meet in case the sentence of imprisonment awarded against accused Ajay by the trial court under Section 376, IPC is reduced to a period of imprisonment of five years and eight months, already undergone by him.

Consequently, the appeal of accused Vineet is allowed. His conviction and sentence passed by the

trial court under Section 376, IPC, read with Section 120-B, IPC, is set aside. He is on bail. His bail bonds are discharged.

The appeal of accused Ajay is partly allowed. His conviction under Section 120-B, IPC, is set-aside, but his conviction under Section 376, IPC, is maintained and his sentence under this Section is reduced to a period of rigorous imprisonment of five years and eight months, already undergone by him. The accused-appellant Ajay is in jail, therefore, he be set at liberty forthwith, in case his custody is not required in any other case.

(Narendra Kumar Jain) J.

//Jaiman//